IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 110.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor,
Petitioner,

v.

JACKSONVILLE PAPER COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

LOUIS KURZ,
608 Consolidated Building,
Jacksonville, Florida,
Attorney for Respondents.

RAGLAND, KURZ & LAYTON,
608 Consolidated Building,
Jacksonville, Florida,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 110.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division, United States Department of Labor,
Petitioner,

v.

JACKSONVILLE PAPER COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENTS.

QUESTIONS PRESENTED.

We do not believe that the questions stated by the Petitioner accurately state the issues before this Court for determination. In our view the question should be stated as follows:

1. Where none of the practices complained of in an application for adjudication in civil contempt were specifically enjoined and where both the District Court and the Circuit Court of Appeals found that these practices were of such a nature as to entitle the Respondents to their day in Court, that the Respondents were not in contempt and hence dismissed the rule to show cause and broadened the injunction, is the Petitioner entitled as a matter of law to a judgment directing payment of back wages claimed to be due to Respondents' employees.

STATEMENT OF THE CASE.

We submit that the recitals in the statement of Petitioner dealing with matters arising prior to the original judgment of the District Court have no proper place in this proceeding. Furthermore, the conclusions drawn do not distinguish between the corporate Respondent Jacksonville Paper Company and the Respondent co-partnership Southern Industries Company, but do attempt to cast upon the Respondents an atmosphere of intentional wrong-doing which the facts do not warrant. The reference to piece-workers, concealment of overtime hours and payment of employees by extra labor vouchers at pages 5 and 6 of Petitioner's brief all relate to the Respondent Southern Industries Company. Only the so-called accumulated hours plan, Petitioner's brief page 7, relates to the Respondent Jacksonville Paper Company. The record clearly refutes any imputation of bad faith with reference to the so-called concealment of overtime hours. The testimony referred to by Petitioner is that of his own Inspector, Mr. Thomas, who stated that when these matters were called to the attention of some of the defendants "they expressed surprise that such things had been found", and made an appointment for a conference (1st R. 181). At that conference the foreman in charge of the department told Mr. Thomas, "It was all my fault. The company did not have a thing to do with it." (1st R. 182). Further information given Mr. Thomas

by this foreman clearly establishes that the foreman was trying to favor some of the men under him by letting them work overtime contrary to the orders of the company (1st R. 197). The same lack of knowledge by the management existed with reference to the extra labor vouchers. Inspector Thomas testified that when he brought this matter to the attention of the management, "Mr. McGehee expressed surprise at it," (1st R. 189).

The accumulated hours plan was incidentally touched upon in the original trial but the injunction was silent as to it "and it failed to find or forbid specifically any practice now in controversy". See opinion of the Circuit Court of Appeals (2nd R. 1122). As pointed out by the District Court (2nd R. 994) the first trial of this case centered around the controversy as to what extent the defendants were subject to the Act, (2nd R. 994), it having been the Administrator's primary contention that the receipt of extra-state goods was alone sufficient to place all employees within the Act.

As to Subdivision B of Petitioner's statement, the District Court found that the Respondents had violated the provisions of the Act in the following particulars:

(a) The use of the accumulated hours plan, as to which he said "At the time the accumulated hours plan was put into effect, it was believed by the defendants to fully comply with the decisions of the Supreme Court of the United States in *Walling* v. *A. H. Belo Corporation*", (2nd R. 1000). Therefore, the language quoted in Petitioner's brief that the plan was "completely false and fictitious", used by the District Court on the following page, when construed in its context, necessarily refers to the legal effect as tested by the subsequent opinions of this Court in which the *Belo* case was distinguished and not as a fraudulent scheme to evade the law.

(b) In failing to treat the annual bonus paid to employees on a fixed percentage of their total earnings during the

prior year, including overtime, as a part of the regular rate of pay during the succeeding year. This bonus was not dependent upon the efforts of the individual but was authorized paid by the Board of Directors annually to all employees having the requisite length of service with the company, regardless of their efficiency or incompetence.

(c) Misclassification of executive and administrative employees. As to some of these the Circuit Court of Appeals said it was a close question but as the District Court was not clearly in error, it would not reverse (2nd R. 1123).

(d) Failure to pay overtime to two piece-rate workers of Southern Industries Company, one of whom was in charge of a separate department and claimed to be exempt as an executive employee.

Notwithstanding all of the inferences of deliberate violation sought to be drawn by the Petitioner, the fact remains that both the District Court and the Circuit Court of Appeals found that the Respondents acted in good faith in seeking a judicial determination of the questions involved.

SUMMARY OF ARGUMENT.

1. Taking up first the summary of Petitioner's argument, commencing page 13 of his brief, it is replete with statements that the practices now complained of were known by the Respondents to be illegal and claimed to be so when the injunction was issued. This is contrary to the finding of the District Court and contrary to the facts. As stated by the Circuit Court of Appeals, "The decree was in general complied with and complaint is now made only as to a few employees affected by these particular practices". (2nd R. 1124). That Court also pointed out that the Administrator waited three years to complain of them. That and other similar expressions contained in the opinions of both the District Court and the Circuit Court of Appeals show that there is no justification for the attempt to brand the Respondents as willful violators of the Act and of the injunc-

tion. No doubt, if such had been the case, the District Court would have been prompt to uphold its dignity by imposing appropriate penalties, rather than dismissing the rule to show cause and treating the proceeding as an application for a broadening of the injunction to cover the practices now for the first time specifically complained of by the Administrator. This is not a case where plain provisions, such as the payment of minimum wages, the keeping of records or the payment of time and a half for excess hours on what the parties considered the regular rate of pay, were claimed to have been violated, but in each instance involves questions on which there can well be a bona fide difference of opinion, as both the lower courts held.

2. The Respondents on the other hand contend:

(a) That Congress has expressly conferred the right to sue for back wages upon the employees affected and their representatives and by doing so, has denied the right of the Administrator to seek such relief, so that he cannot accomplish by indirection what the Act precludes him from doing directly. The Administrator has recognized this limitation upon his powers, for among his first recommendations for further legislation, in his Annual Report to Congress of January 1, 1945,[1] he asks that such a provision be added to the Act coupled, however, with a safeguard to employers by way of waiver of the double liability provision contained in Section 16(b). Similar recommendations are embodied in each subsequent report, including that for the fiscal year 1947, in which he says at page 9,

---

[1] "The labor laws of several states give the administrative agency in charge of the enforcement of their minimum wage laws power to sue directly to secure the restitution of unpaid wages to the employees upon assignment of their claims. If such a provision were added to Section 16(b) of the Fair Labor Standards Act, it would increase the efficiency of enforcement and facilitate the collection of restitution."

"The Administrator is not empowered to order restitution of back wages owed under the Fair Labor Standards Act."

Annual Report, Wage and Hour Division, January 1, 1945, page 7.

See also, Annual Report, November 1, 1945, page 1; Annual Report, January 2, 1947, pages 64 and 65, renewing the recommendation with the further limitation that the right be granted to sue upon request of employees to whom such wages are due.)

(b) That the statute creates a right of action for back wages and confers a remedy upon the employees affected, which remedy is exclusive and does not authorize a court of equity to enlarge the same by requiring restitution at the suit of the Administrator, particularly as Section 17 of the Act dealing with injunction proceedings gives to District Courts jurisdiction "to restrain violations of Section 15" and no more.

(c) That the right to require restitution, if authorized under the language of the statute, is not mandatory, but rests in the sound discretion of the Court, to be granted or denied as the circumstances of the case may require.

(d) That the jurisdiction of courts of equity in civil contempt proceedings to award damages in appropriate cases for violation of injunction orders stems from the principle that equity, having assumed jurisdiction, will do complete justice between the parties and not require a separate suit at law for the damage caused by such violation, so that the relief given is limited to the damages sustained by the plaintiff, for which he could maintain a separate suit at law, and does not justify an award to a plaintiff for damages sustained by others for which they have a separate and independent remedy, especially if that remedy is not completely barred by the decree of the equity court, as would be the case here, for the employees could still, if they desire, sue for liquidated damages.

ARGUMENT.

1. The Administrator is Without Authority to Sue for Back Wages.

In the adoption of the Fair Labor Standards Act Congress provided in great detail the machinery for its enforcement. By Section 4(b), attorneys appointed by the Administrator may appear for and represent the Administrator in any litigation, but all such litigation is subject to the direction and control of the Attorney General. Section 11(a) provides that with the exception of violations of the child labor provisions, the Administrator shall bring all actions under Section 17 to restrain violations of this Act. By Section 16(a) criminal penalties are provided for intentional violations and by Section 16(b), liability is imposed upon the employer for failure to pay wages in accordance with the provisions of the Act, but it is expressly provided that such liability shall be to the employee or employees affected and that the action to recover such liability may be maintained, "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated". It is to be noted that the fact that the liability is to the employees is stated not less than three times in this short paragraph of the Act. Injunction proceedings on the other hand are expressly provided for in Section 17 giving to District Courts of the United States jurisdiction "to restrain violations of Section 15" and no more. This powerful battery of weapons does not call for reinforcement with armor not provided in the Act", as said Mr. Justice Rutledge in the *Warner Holding Company* case. We have already adverted to the recommendations to Congress made by the Administrator in his reports commencing with that of January 1, 1945. Numerous amendments have from time to time been

introduced,[2] and it is significant that Congress did not see fit to adopt the Administrator's recommendations in that behalf. On the contrary, Section 16(b) of the Fair Labor Standards Act was amended by Section 5 of the Portal to Portal Act of 1947 (Public Law 49, 80th Congress), by eliminating the right of employees to designate an agent to maintain the suit and providing that no employee shall be a party plaintiff to any such action unless his consent in writing is filed in the Court in which such action is brought. It, therefore, appears that Congress has restricted the right of action to recover back wages, rather than to enlarge it as requested by the Administrator. The Circuit Court of Appeals for the Fifth Circuit has held that the Administrator cannot, in the guise of a compensatory fine, obtain a remedy which the Act gives only to the employees. *Walling* v. *Crane*, 158 Fed. (2d) 80. On remand, the District Court awarded an amount as compensation for the loss sustained by the Administrator, 14 Labor Cases 64,527, and the case is now again before the Circuit Court of Appeals, having recently been argued.

2. The Remedy Conferred Upon Employees to Sue for Back Wages is Exclusive.

As pointed out above, Section 16(b) of the Act creates a liability in favor of the employees, and the employees only, to recover amounts due for violation of the minimum wage and maximum hour provisions. Where a statute creates a right and provides a remedy, that remedy is exclusive.

50 A. J. Title Statutes, page 593

Globe Newspaper Company v. *Walker*, 210 U. S. 365

Wilder Mfg. Co. v. *Corn Products Refining Co.*, 236 U. S. 165

---

[2] See for instance, the First Annual Report of the Administrator, page 160, the Report of January 28, 1942, page XI, and the Report of January 2, 1947, page 88.

While in the case of *Porter v. Warner Holding Co.*, 328 U. S. 395, this Court held that in the exercise of its inherent equitable jurisdiction, the District Court might have required restitution, it must be borne in mind that the statute there under consideration, i.e., Section 205(a) of the Emergency Price Control Act, 50 U. S. C. A. Appendix, Paragraph 925, is materially different, in that the Price Administrator is empowered not only to enjoin violations of the Act, but to apply to the Court "for an order enforcing compliance with such provisions and upon a showing by the Administrator . . . a permanent or temporary injunction, restraining order or *other order* shall be granted without bond." The Fair Labor Standards Act does not contain so broad a provision, but limits the jurisdiction of the District Courts in injunction proceedings "to restrain violations of Section 15". The words "other order" were stressed in the opinion of this Court in the Warner Holding Company case. Furthermore, in that case, both the District Court and the Circuit Court of Appeals held that there was no jurisdiction under the statute to order restitution. It was that holding of lack of jurisdiction which brought about the reversal of the case and its remand so that the lower Court might exercise its discretion. Therefore, even if this Court should disagree with our contention as to lack of jurisdiction, nothing in the opinion of that case sustains the contention of the Petitioner that restitution must be ordered in the instant proceeding as a matter of right. In the present case the District Court did not hold that it lacked jurisdiction but that there was no evidence which would justify the infliction of a penalty measured by the amount of unpaid statutory wages (2nd R. 1101), and the Circuit Court of Appeals in its order of affirmance, reserved the right to the Administrator to apply to the District Court for a further order requiring retroactive reparation as an incident of the decree of restraint, without, however, expressing an opinion as to his right to such relief.

Likewise in *Bowles* v. *Skaggs*, 151 Fed. (2d) 817, the Circuit Court of Appeals for the Sixth Circuit pointed out that the words "other order" in the Emergency Price Control Act authorized the Court to exercise normal equity jurisdiction, but also held that the Court was not compelled to grant restitution, saying:

> "By our view that the court was empowered to exercise normal equity discretion in fashioning its remedy, we do not intend to suggest that the court is compelled to grant restitution. No discretion was here exercised. The court concluded it had no jurisdiction to entertain the petition. So deciding, the matter was rightly at an end."

In *Creedon* v. *Randolph*, 165 Fed. (2d) 918, the Court also dealt with the Price Control Act. That was a suit by the Price Administrator to require repayment of a rent overcharge, which was dismissed because the District Court found there was no legal basis for the exercise of its jurisdiction. The Circuit Court of Appeals held that jurisdiction existed and remanded the case for further proceedings. Inferentially, at least, the language of the Circuit Court of Appeals in *Walling* v. *Miller*, 138 Fed. (2d) 629, supports the contention that the Administrator lacks authority to compel restitution. That case involved a consent decree based on a stipulation agreeing to pay back wages. On motion to vacate that portion of the decree awarding restitution, the District Court held that the Act did not authorize such relief and that the Court lacked jurisdiction to grant it, hence vacated so much of the decree as ordered restitution. The Circuit Court of Appeals held that the inclusion of restitution went only to the merits, not to the jurisdiction or power of the Court, and said at page 632:

> "The contention may be sound that the Administrator lacked authority to maintain an action for restitution because the statute having created a right (a liability) and having given a special remedy for its enforcement, that remedy is exclusive; but, if such contention be

correct, it shows only that the court erred in rendering the decree and in finding at that time that the remedy given the employees is not exclusive. The error pertained only to the capacity of the plaintiff and to the remedy, not to the power of the court. Whether the administrator 'has the requisite standing' to maintain a suit for restitution 'is a question going to the merits', and the decree is not subject to attack for such an error by motion to vacate. General Inv. Co. v. New York Central R. R. supra. The right of the administrator to make such an attack was waived by the defendants. The inherent power of the court to enter the order appealed from is not involved. It was error to sustain the motion."

See also the opinion of the Circuit Court of Appeals for the Second Circuit in *Decorative Stone Co.* v. *Building Trades Council*, 23 Fed. (2d) 426, certiorari denied, 277 U. S. 594, an action under the Clayton Act (15 U. S. C. A. Par. 26) for injunction and treble damages for past violations. The Court held that the right to equitable relief against threatened loss under Section 16 of the Act could not be interpreted broadly enough to authorize the Court, as incidental to injunctive relief, to award treble damages for past violations of the anti-trust laws and answered plaintiff's contention that if the statutory damages might not be recovered in that suit, he should be allowed to recover compensatory damages under the common law principle that where a statute makes certain conduct unlawful, a person who is of the class intended to be protected, and who has sustained special damages from a violation of that statute, may maintain an action therefor, by saying at page 428:

"But it is an equally well recognized principle that where, as here, a statute created a right and prescribes a remedy, the statutory remedy is exclusive. Globe Newspaper Co. v. Walker, 210 U. S. 356, 28 S. Ct. 726, 52 L. Ed. 1096; Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376; Yates v. Jones Nat. Bank, 206 U. S. 158, 179, 27 S. Ct. 638, 51 L. Ed. 1002. The citation of Pollard v.

Bailey in the Fleitmann Case indicates that this doctrine was there thought to be applicable to Section 7 of the Sherman Act (15 USCA Sec. 4), in providing that an injunction at the suit of government officials, impliedly negatived the right of a private person to obtain injunctive relief. By parity of reasoning, we think the remedy which the act gave for damages was also exclusive. See Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 174, 35 S. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 181. We are of opinion, therefore, that the complainant's only right to damages was the statutory right, and that, for reasons already given, this right is not enforceable in the District Court as an incident to injunctive relief."

Petitioner also places great reliance on *Parker* v. *U. S.*, 153 Fed. (2d) 66. That was a proceeding under the Agricultural Adjustment Act (7 U. S. C. A. 601, etc.) which is very broad in its grant of powers to the Secretary of Agriculture. Section 608(a) (6) of that Act gives the District Courts jurisdiction to enforce, prevent or restrain any person from violating any order, regulation or agreement pursuant to the Act and specifically provides in Sub-paragraph (8) that the remedies enumerated in that Section shall be in addition to and not exclusive of any of the remedies or penalties provided for elsewhere in that chapter or now or hereafter existing at law or in equity. This is a much broader and more specific grant of jurisdiction than that contained in the Fair Labor Standards Act. Furthermore that case points out that the remedy is "to compensate complainant for loss caused by respondent's disobedience of such a decree."

3. The Award of a Compensatory Fine in Civil Contempt Proceedings is Not Mandatory.

In 43 C. J. S., Title Injunction, page 1048, it is pointed out that the Court granting an injunction is clothed with a large discretion in enforcing obedience to it and in a proceeding for its violation, the extent of the punishment

to be inflicted, rests in the sound legal discretion of the Court. Cases from Illinois, Indiana and a number of other states are cited in support of that text. See also, *Bowles* v. *Skaggs, Creedon* v. *Randolph* and *Porter* v. *Warner Holding Co., supra.*

In *Hecht Company* v. *Bowles*, 321 U. S. 321, 88 L. Ed. 754 the Price Administrator contended that he was entitled as of right to an injunction upon a showing that the defendant had engaged or was about to engage in practices violative of the Price Control Act, relying upon the words of the statute that upon a showing of violation, an injunction "shall be granted". Mr. Justice Douglas, speaking for the Court in that case, however, found that such was not the Congressional intent and said:

> "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

It must be assumed that Congress would have used unequivocal language in the Fair Labor Standards Act if its purpose had been to make it mandatory upon the District Courts to award restitution in injunction proceedings at the suit of the Administrator, upon the finding that violations of the wage and hour provisions existed, just as this Court found that unequivocal language would have been required in the Price Control Act to make the granting of an injunction mandatory upon the finding of violation. Instead of this, the right of action to recover wages due was expressly limited to employees affected.

Some of the cases relied upon by the Petitioner in support of his contention have just the contrary effect. For instance, in *Rodgers* v. *Pitt*, 89 Fed. 424, the Court found that there was a violation of the injunction, but that the same was not willful, and said at page 430:

> "As regards the rights of persons affected by an injunction, the fact that defendant has violated the mandate of the court under the advice of counsel constitutes no sufficient ground of defense in his favor. We have already seen that the motive with which the breach is committed constitutes no excuse for the wrongful act, and equity will protect persons affected by the writ from any violations of its terms, even though committed under the sanction and advice of counsel. * * * It is to be observed, however, that, while the fact of defendant having committed the breach under the advice of counsel * * * affords no justification for his conduct, yet, if such advice be given in good faith, it may properly be taken into account in determining the degree of punishment to be inflicted for the breach, and may thus palliate, although it cannot justify, the violation."

Likewise, in *Lustgarten* v. *Felt & Tarrant Mfg. Co.*, 92 Fed. (2d) 277, the Court said at page 280,

> "That appellants may have deemed that they were in no wise violating the injunction and were acting in good faith may be taken into consideration in mitigation of their offense."

Another case cited by the Petitioner is *Freeman* v. *Premier Machine Co.*, 25 F. Supp. 927. That was a contempt proceeding growing out of the violation of an injunction in a patent infringement case, in which plaintiff sought to recover by way of a compensatory fine expenses in excess of $1,000.00 incurred by him in the contempt proceeding. The Court found, however, that the defendant was acting in good faith and, therefore, refused to impose a penalty in excess of $100.00.

The case of *McComb* v. *Scerbo & Son*, 8 W. H. Cases, 304, 16 L. C. 64,771 in the District Court for the Southern District of New York also is relied upon by the Petitioner. In that case the defendants consented to the entry of an injunction, but contended that the Court was without authority to direct the payment of back wages. The Court did

grant such relief, not, however, as a mandatory duty but in the exercise of his "discretion under the circumstances of this particular case".

Furthermore, the Court relied for his decision, among others, on the case of *Walling* v. *O'Grady*, 146 Fed. (2d) 422 also cited by the Petitioner. That case can be distinguished from an action involving payment of back wages under Sections 6 and 7 of the Act, for the Act is silent concerning the remedy of an employee who is discharged in violation of the provisions of Section 15(a) (3), neither does it provide for the payment of a penalty in double the amount due and attorneys fees, as does Section 16(b), whereas the remedy given to employees by Section 16(b) relates only to the recovery of amounts due for violation of the provisions of Sections 6 and 7. In view of the double penalty and attorneys fees provision of Section 16 (b), the reason given in the O'Grady case for the exercise of its jurisdiction i.e. that "the amount involved ordinarily would be small and the expenses of recovery disproportionate", does not apply to actions instituted under Section 16 (b). Again the Court, while referred to its former decision in *Decorative Stone Co.* v. *Building Trades Council, supra*, did not overrule it and it is still the applicable law under facts such as are presented in the instant case.

The District Court also referred to the concurring opinion of Judge Woodrough in *Walling* v. *Miller, supra* and to the opinion of the District Court for Connecticut in *Walling* v. *Alderman*, 51 Fed. Supp. 800. Judge Woodrough's language did not express the views of the majority of the Court, as we have already pointed out and at any rate, it is mere dictum, as the question he discussed was not before the Court for decision. The opinion of the District Court in the Alderman case shows that it is based on a consent decree entered pursuant to a stipulation agreeing to the payment of back wages and contempt proceedings for failure to comply with the decree. At

that stage, defendants moved to vacate so much of the judgment as required restitution, on the ground that the Court lacked jurisdiction. The Court did not agree with that contention, held that it did have jurisdiction and that the defendants, having consented to the entry of the decree were not in a position to complain. We respectfully submit that *McComb* v. *Scerbo & Son, supra,* was wrongly decided but at any rate, it is not authority for the proposition that there is a mandatory duty on the Court to enter an order of restitution.

That appears to be the first case in which the Administrator sought to compel restitution in connection with a contested injunction proceeding. In view of the hundreds of cases instituted, that alone is significant and indicates that the Administrator is hopeful that the Courts will, by judicial legislation, give him an authority which he has assiduously sought from Congress for many years, but which Congress did not see fit to bestow. It is also interesting that Counsel for the Administrator took an entirely different view of the matter in his brief on the first appeal to the Circuit Court of Appeals in the instant case for they then disclaimed the very thing they now seek to compel the Court to decree.[3]

All of the other cases relied upon by the Administrator and cited at page 44 of his brief, involve consent decrees and hence cannot be considered as authority that the Court must as a matter of course decree the payment of back wages at the behest of the Administrator, either

---

[3] Brief for Administrator-Appellant, page 49, "The Administrator's duty is not the vindication of private rights . . . he seeks no private award operating by way of penalty, etc." And at page 60, "In the event that a violation is charged and there is a dispute about the matter, no penalty can attach until after full hearing the trial court decides that specific conduct is in clear contempt of its decree. The decree below, therefore, plainly does not expose defendant to punishment based upon trifling or unintended violations of the Act."

in the granting of an original injunction or in contempt proceedings based thereon.

Walling v. *Miller*, 138 Fed. (2d) 629.

4. The Principle That Equity Will Afford Complete Relief Not Applicable Here.

In *Pomeroy's Equity Jurisprudence*, 4th Edition, Paragraph 237, it is said that courts of equity, having obtained jurisdiction for the purpose of awarding special relief by way of injunction which in many instances is not complete, will retain the cause and decree full and final relief including damages, and quotes from the opinion of Lord Hardwicke in *Jesus College* v. *Bloom*, 3 Atl. 262, as follows:

> "So in bills for an injunction, the Court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law as well as a bill here".

That reason, however, would not apply here, for any decree which the Court might enter for payment of back wages would still leave the employees free to sue for the liquidated damages provided in Section 16 (b).

Schulte v. *Gangi*, 328 U. S. 108, 90 L. Ed. 1114.

This possible consequence was pointed out by the Circuit Court of Appeals in this opinion (2nd R. 1125). It was not present in *Creedon* v. *Randolph*, *supra*, because there the action on part of the tenant was already barred by the statute of limitations. In Volume 1, page 409 of *Pomeroy*, that noted authority on equity jurisprudence, dealing with the avoidance of multiplicity of suits, says:

> "The equity must result in the simplification or consolidation of the issues. If after the numerous parties are joined, there still remains separate issues to be tried between each of them and the single plaintiff or defendant, nothing has been gained by the Court.

of equity assuming jurisdiction. In such case 'while the proceeding has only one number on the docket and calls itself a single proceeding, it is really a bundle of separate suits, each of which is no doubt similar in character to the others, but rests nevertheless upon separate and distinct liabilities of one defendant'."

That would be the situation here, for while the Court has decided that certain practices are in violation of the Act, yet in the application of the principle to specific employees and bearing in mind that each work-week must be treated as a unit and that the activities of the employee during that particular work-week are the criterion of coverage, we come to serious practical difficulties in determining the amount due to the individual employees, in many instances. It must be borne in mind that we are not dealing here with a large manufacturing plant or similar establishment employing numerous employees under exactly similar conditions, but a number of separate wholesale houses, some large, some small, in the latter of which particularly the conditions vary from week to week. For instance, at the St. Petersburg branch, which sells only to customers in the State of Florida and has no railroad siding (2nd R. 623) freight from out of the State is received by rail in split-car shipments only two or three times per month (2nd R. 624) and only two out of state shipments by truck were received in the course of six months (2nd R. 625). At Orlando, which likewise sells only in the State, pool cars are received only 7 to 10 times per year and take from one to three hours to unload (2nd R. 749-50) and less than carload shipments are received up to three times in some weeks, then none for several weeks (2nd R. 751). The same condition applies in Lakeland (2nd R. 828). It cannot be said, therefore, that the employees unloading such shipments and placing them in stock were covered each and every week, hence a detailed inquiry would be necessary to determine the amounts due them. It seems that rather than facilitating the enforce-

ment of the Act by the Administrator, the contrary would be the case if all of these matters had to be litigated in the injunction proceedings, for in order to make a valid decree, the Court would have to take testimony concerning the exact amount of wages due to each of possibly hundreds of employees, rather than passing upon the legality or illegality of the challenged practices as such and letting the question of liability to the individual employees be determined in separate proceedings brought by them, in which the question of individual liability can be determined under applicable procedure, including trial by jury on disputed questions of fact.

It does not appeaf, therefore, that the principle of avoidance of multiplicity of suits will apply in a situation such as this, for instead of disposing of the entire litigation, it would be productive of additional suits by employees to recover the statutory penalty. If the Court should attempt to bring in all the employees as parties to the suit, as suggested in the Warner Holding Company case, supra, then we run afoul of the present statutory requirement that a suit on behalf of the employees may only be maintained with their consent in writing and surely a court of equity will not go to such lengths under the guise of doing complete justice in an injunction proceeding.

As counsel for Petitioner himself recognizes in his brief that in civil contempt proceedings good faith may be considered in determining the penalty, which here is sought by way of a compensatory fine, we do not further discuss the cases in detail, except to point out that *Penfield Co. v. Securities & Exchange Comm.*, 330 U. S. 593, dealt with an entirely different situation. There the Securities & Exchange Commission was charged with the duty of inspecting books and records which the defendant refused to produce. The Court, instead of compelling production of these records, imposed a small fine and left the Commission in a position where it could not carry out its statutory duty of inspection. Here no duty is imposed upon the

Administrator to collect back wages. He produced no evidence that he had been damaged, but sought to accomplish in the guise of a compensatory fine the very thing Congress had denied to give him. As stated by the Fifth Circuit Court of Appeals in *Walling* v. *Crane*, 158 Fed. (2d) 80, at page 85,

> "But even if he were authorized to sue for wages due employees, and in that capacity had secured a specific judgment for the amount of the wages due, he could not then maintain contempt proceedings for the avowed purpose of using the punitive powers of such a proceeding to collect the judgment through the device of 'a compensatory fine in an amount equal to the underpayments', which, stripped of its nomenclature and viewed in the light of reality, would show up simply as the imposition of punishment in an attempt to collect a debt."

A number of cases are cited on page 19 of Petitioner's brief to the effect that proof of intentional defiance is not required in civil contempt. However, he states at page 20 "While it '*may affect the extent of the penalty*' to be imposed for contempt, the absence of wilfulness does 'not relieve from liability for a civil contempt'." (Italics supplied). That is the theory under which the Court here acted. It found no contempt to exist because the Respondents were entitled to a judicial determination of the legality of the practices complained of in this proceeding and the original injunction "may not be used as a catch penny contrivance to snare the ignorant, the unsuspecting and unwary".

Nasif v. *U. S.*, 165 Fed. 119

Regal Knitwear Co. v. *Labor Board*, 324 U. S. 9, 15.

Furthermore, such damages when awarded must not exceed the actual loss to *the complainant* and must be based upon evidence of *complainant's* actual loss.

Parker v. *U. S.*, 153 Fed. (2d) 66

In *U. S. v. United Mine Workers*, 330 U. S. 258, at page 304, this Court said:

> "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order *and to compensate the complainant* for losses sustained. Gompers v. Bucks, Stove & Range Co., supra (221 US.448, 449, 55 L. Ed. 808, 809, 31 S. Ct. 492, 34 LRA (NS) 874). Where compensation is extended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's *actual loss*, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, *the court's discretion* is otherwise exercised. It must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." (Italics supplied.)

Here the primary purpose of the proceeding was to enforce compliance, not to seek compensation for third parties.

The argument is made that payment of back wages should be ordered not only in the public interest but to remove what amounts to a discrimination against complying competitors. A like contention was presented in the original proceeding but was disposed of by this Court in

Walling v. *Jacksonville Paper Co.*, 317 U. S. 564

at page 570, where Mr. Justice Douglas, speaking for the Court, said:

> "We may assume the validity of the argument that since wholesalers doing a local business are in competition with wholesalers doing an interstate business, the latter would be prejudiced if their competitors were not required to comply with the same labor standards. That consideration, however, would be pertinent only

> if the Act extended to businesses or transactions 'affecting commerce'. But as we noted in the Kirschbaum case the Act did not go so far."

Again and again Petitioner says that the practices complained of in the contempt proceedings were exactly the same sort of illegal practice as had been charged at the original trial. We have already pointed out that such was not the case except in the very broadest sense and that both the District Court and the Circuit Court of Appeals so found. The alleged violations complained of by the Administrator in the contempt proceedings come in the same category as those discussed by Mr. Justice Reed in

Bay Ridge Operating Co. v. *Aaron*, 92 L. Ed. 1146

where he said,

> "These cases present another aspect of the perplexing problem of what constitutes the regular rate of pay which the Fair Labor Standards Act requires to be used in computing the proper payment for work in excess of 40 hours."

This reiteration, therefore, should not require further comment but we wish to point out with reference to the statement at page 22 of Petitioner's brief that Respondents were still underpaying piece workers, that this refers to men employed in the Coat Hanger Department of Southern Industries Company, one of whom was in complete charge of the department and operated the day shift, whom respondents considered exempt as an executive employee, and one other employee, although changed from time to time (2nd R. 241, 246). Furthermore, (1st R. 199) Inspector Thomas was asked whether shortly after his conference with Mr. McGehee, piece workers were not placed under the Wage and Hour Act and he replied, "I am told that happened, Sir". At (1st R. 539) there was a proffer of proof that shortly after October 24, 1938 and long prior to the filing of the first proceeding on July 8, 1940, the persons in

charge of the company placed the plant on a 44 hour basis, installed a time clock and otherwise attempted to comply with the minimum wage and maximum hour provision of the Act, which proffer of proof was rejected by the Court as not being pertinent under his rulings that an injunction would issue if violations had existed prior to the filing of the suit.

On page 27 of his brief, Petitioner also says that the Respondents did not keep the prescribed records, referring to the opinion of the District Court which found (2nd R. 1009) that the Administrator's complaint on that score grew out of the fact that the local manager of Jacksonville Paper Company in some instances allowed employees time off without loss of compensation and to later make up such loss of time by working short periods of overtime which practice had been discontinued when the Administrator complained of it. The Court did not even find it necessary to take any action with reference to that complaint.

Neither does the record justify the statement on page 32 of the brief of Petitioner that the violations involved in these contempt proceedings were exactly the same sort of illegal practices charged in the original trial. Exactly the contrary is the fact, as found by the District Court (2nd R. 1010).

The complaint in that proceeding was in the most general terms and simply charged that the defendants paid to many of their respective employees less than the minimum wages (1st R. 5), and that the defendants paid "certain of their respective employees who were engaged in interstate commerce" less than one and one-half times the regular rate for hours worked in excess of the statutory maximum (1st R. 6). There was also a charge in the same general terms of violation of the record keeping requirements and "hot goods" provisions of the Act (1st R. 8).

It will be seen, therefore, that there was nothing in the complaint which would give the defendant notice of specific violations. The testimony was voluminous and covered

a wide range so that here again no specific acts constituting violation were brought home to the defendants: The reason for this, no doubt, was that the Administrator at that time was confident that the Court would hold the receipt of extra-state goods to be sufficient predicate for coverage: certainly that was the theory upon which the case was tried. The Administrator being fully aware of all of the facts brought out at the first trial, defendants could reasonably conclude that he would specifically enjoin all practices which he then claimed to be in violation of the Act for as stated by District Judge Underwood in *McComb* v. *Crane*, 14 Labor Cases, 64,257:.

> "An injunctional order should be as explicit as the case permits (Cleveland Trust Co. v. Schriber-Schroth Co., C. C. A. 6, 108 Fed. (2d) 109, 115), and should point 'out with definiteness what is to be done or not done'. (Borren v. El Paso National Bank, C. C. A. 5, 133 F. (2d) 698, 703."

If placed in a dilemma by an ambiguous order, one who acts in good faith and with due respect to the Court is not guilty of contempt.

> *National Labor Relations Board* v. *Bell Oil & Gas Co.* C. C. A. 5, 98 Fed. (2d) 405

The statement is made at page 43 of Petitioner's brief that it has been the usual practice of the Courts throughout the Country to order restitution for violation of injunctions in civil contempt actions under the Fair Labor Standards Act and that no question as to the propriety of this practice has been raised outside the Fifth Circuit, but it appears that all of the cases cited involved consent decrees, hence they are entitled to but little weight and certainly can not be taken as an adjudication that the Court must in every instance and without exercise of judicial discretion order payment of back wages in such proceedings. As a matter

of fact, in a very substantial number of instances, the Administrator has not been able to secure such consents.[4]

There is another reason why back pay should not be awarded in this proceeding, i. e., that the Circuit Court of Appeals should not have affirmed the District Court in at least some of its findings. For instance, the District Court found that the annual bonus based on a percentage of the total compensation for the prior year should be taken into consideration in determining the regular rate of pay, (2nd R. 1002), that bonus is clearly distinguishable from the plans held by this Court to be a part of the regular rate of pay in

Walling v. *Youngerman Reynolds Hardware Co.*, 325 U. S. 418, 89 L. Ed. 1705

Walling v. *Harnishfeger Corp.*, 325 U. S. 427, 89 L. Ed. 1711

and similar cases as is clearly pointed out by the Circuit Court of Appeals in

DeWaters v. *Macklin Co.*, 167 Fed. (2d) 694.

There the employer adopted what was denominated a "production savings plan" as an inducement to more efficient operation. The Court distinguished the Youngerman Reynolds and other cases above referred to and said, at page 698:

> "The profits to be so shared were the combined results of the efficient efforts of all employees, all departments, and the management. No individual employee received his additional compensation on the basis of what he individually did, or on the basis of his individual piece rate production. One individual em-

[4] See his Annual Report for the year 1946, page 20, where it appears that whereas $13,400,000.00 was agreed or ordered to be paid $8,200,000.00 was due from employers who refused to make restitution.

> ployee, or even a group of employees, might be less efficient than normally in one particular month, yet due to increased efficiency of other employees, or other departments, or on the part of the management, or by the reason of the installation of improved machinery, the total result for that month might show a production savings fund available for distribution.

Here likewise the Board of Directors annually authorizes payment of a bonus, not on the individual industry of the employees, but rather based on the prosperity of the company as a whole. To now designate this as an addition to the regular rate of pay is not only inconsistent with the intent of the parties, but would, in effect, constitute a violation of the wage stabilization program in effect during much of this time, which forbade increases in compensation without the approval of the Wage Stabilization Unit of the Wage and Hour Division.

Another incident in which we feel that the District Court reached an erroneous conclusion is with reference to the two superintendents of Southern Industries Company, i. e., Cantrell and Klehm. Each are in charge of a department of Southern Industries Company (2nd R. 267-277). Klehm received $65.00 per week, Cantrell $55.00 per week, plus an overriding bonus on the number of tablets manufactured. The departments are separate (2nd R. 270) and their work requires a high degree of skill. W. O. Mathias, in charge of the coat hanger department, likewise is in charge of a separate department (2nd R. 242) and all of these men have authority to hire and fire. Their duties cannot be distinguished from the duties of the engineers in charge of the powerhouse in *Walling* v. *General Industries Co.* 330 U. S. 545, 91 L. Ed. 799, and the Circuit Court of Appeals indicated that such would have been its finding (2nd R. 1123).

Under these circumstances it would be particularly inequitable to reverse the exercise of discretion of the District Court and direct the entry of an order awarding restitution merely because the Respondents concluded not to ap-

ply for certiorari and when the Administrator filed his Petition two days before the time expired, it was then too late for the Respondents to file Cross-Petition, as their Motion for Extension of Time was denied by this Court.

Respectfully submitted,

LOUIS KURZ,
Attorney for Respondents,
608 Consolidated Building,
Jacksonville, Florida.